No. 11040.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

First National Benefit Society,

Appellant,

vs.

Maynard Garrison, Insurance Commissioner of the State of California, and H. F. Risbrough and Mae Barr Long, Deputy Insurance Commissioners of the State of California,

Appellees.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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Statement of the Pleadings.

1. Jurisdiction.

The basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment of dismissal herein is as follows:

Plaintiff has complained that defendants have interfered, and unless restrained, will continue to interfere with the rights of plaintiff in violation of Art. 1, Sec. 8, Para. 3, known as the Commerce Clause, of the Constitution of the United States, and in violation of its rights under the Fourteenth Amendment thereto. Under the pleadings

herein there is involved the validity of Sections 703(a) and 1642 of the Insurance Code of the State of California, and the rights of plaintiff under the above provisions of the Constitution of the United States, and the amount of damage involved is more than $3,000.00. The said matters therefore involve a Federal question within the jurisdiction of the district Court and of this Court on Appeal.

2. Statutory Provisions.

The statutory provisions believed to sustain the jurisdiction are as follows:

U. S. C. A., Title 28, Para. 41 (1), under which Federal District Courts are given original jurisdiction of all suits arising under the Constitution of the United States or the laws of the United States or treaties made or which shall be made under their authority.

3. Abstract of the Pleadings.

The Complaint alleges that the Plaintiff and Appellant herein is a non-profit corporation, organized and existing under and by virtue of the mutual benefit corporation laws of the State of Arizona and operating by the authority of the Corporation Commisison of the said state, [Tr. Rec., p. 2].

That the said plaintiff has many members in the State of California. That many of them were acquired by application by mail to the home office. That many of them were acquired by contract of assumption from California corporations, and that all applications for membership are forwarded to the home office in Phoenix, Arizona and are there accepted or rejected, and that all premiums, dues and assessments are paid direct to the home office in

Phoenix, Arizona. [Tr. Rec., p. 3]. That appellant has many members in the State of California who acquired their policies while living in Arizona and thereafter removed to the State of California, [Tr. Rec., p. 10].

That the plaintiff has never maintained an office or agency in the State of California and has never done business in the State of California, [Tr. Rec., p. 3].

That plaintiff and appellant has corresponded with applicants in the State of California. That plaintiff has upon many occasions received inquiries from persons residing in the State of California in regard to its insurance policies or benefit certificates and has thereupon sent its representatives, also members of the said Society, to call upon persons making such inquiries. That applications have been signed by the said residents of California and thereupon forwarded to the home office for acceptance or rejection. That upon acceptance of the said applications, the policies are issued at the home office at Phoenix, Arizona, and mailed direct to the insured with notice to pay all premiums at the home office, [Tr. Rec., p. 3 and 4].

That complaint further states that after such a transaction with one Alvin J. O'Lein, the latter, acting under the instructions and request of Maynard Garrison, Insurance Commissioner, acting through his deputies, filed a complaint against the said representative, F. O. Robertson, charging the said representative with selling insurance in the State of California without a license and with aiding a non-admitted insurer to transact insurance business in the State of California, and that the said F. O. Robertson was arrested in accordance with the said complaint, [Tr. Rec., p. 4 and 5].

The complaint further alleges that the defendants under claim of right but actually without right and in violation

of the Commerce Clause of the Constitution of the United States and repugnant to the Fourteenth Amendment thereof, has interfered with the representatives of the plaintiff and threatened them with prosecution, and has ordered the said persons not to assist in such transactions for plaintiff and sets forth the names of the persons so interfered with and ordered not to so assist in such transactions and alleges that the said assistance rendered by these agents is but one step in a chain of events constituting interstate transactions, [Tr. Rec., p. 5].

The complaint alleges that Plaintiff has no plain, speedy or adequate remedy at law and that pecuniary compensation would not afford adequate relief and sets forth the reasons therefor, [Tr. Rec., p. 5 and 6].

The complaint then sets forth a second cause of action, alleging that the defendants have interfered with and disturbed the members of the First National Benefit Society, and alleges that the defendants have advised said members to sever connections with the said Society and forfeit their certificates therein; and that the defendants have advised members of the said Society that their certificates were "illegal" and that they were "not worth the paper they are written on," and that the said defendants had entered upon a campaign of molestation and interference with the members of the said plaintiff and alleges that the said certificates issued by the plaintiff are *legal* and authorized by law and that the statements of the defendants are false and untrue and are known by them to be false and untrue, [Tr. Rec., p. 6 and 7].

Complaint further alleges that Plaintiff has members in the State of California who obtained their insurance policies in the State of Arizona and removed to the State of California and that the defendants have interfered with

the said members and have advised them that their certificates were unlawful and illegal and of no value whatsoever, [Tr. Rec., p. 10].

The said complaint sets forth a series of acts of the defendants, interfering with plaintiff's members and counseling them to discontinue their insurance certificates with plaintiff, and advising the said members that they could not collect on plaintiff's policies in case of loss, and advising them to insure with a California corporation, and inflicting damage upon the plaintiff in excess of $3,000.00, [Tr. Rec., p. 8, 9, and 10], and that the said plaintiff had lost ten thousand of its California members, involving an annual dues loss of $240,000.00 by reason of the alleged acts, conduct, matters and things done by the defendants, [Tr. Rec., p. 10, para. VII].

The Complaint alleges that there is no provision for the admission of plaintiff to do business in the State of California, and that it is prohibited from doing business in that state, but that there is a provision for the regulation of local insurance companies of the same type and that the defendants have been and are continuing to discriminate against plaintiff, [Tr. Rec., p. 6].

Plaintiff asks for an injunction restraining the defendants from doing any of the said acts and for damages already sustained, [Tr. Rec., p. 11].

Defendants filed a Notice of Motion to Dismiss; and Motion for More Definite Statement upon the following grounds:

(a) No substantial Federal question is presented;

(b) The matter in controversy arises under the laws of the State of California;

(c) Assuming plaintiff to be engaged in interstate commerce, since Congress has not legislated in

the field plaintiff has failed to comply with valid regulations of the State of California;

(d) The State of California has not consented to be sued;

(e) The amount in controversy is less than $3,000.00, exclusive of interest and costs. [Tr. Rec. p. 13].

Filed with this Motion to Dismiss was the Motion for More Definite Statement; the matter, however, was disposed of on the Motion to Dismiss.

Plaintiff filed Points and Authorities in Opposition to Defendant's Motion to Dismiss and/or Motion for More Definite Statement. The matter was argued and briefed and a judgment of dismissal ordered by the Court and filed herein.

The Court apparently rendered its opinion granting the Motion to Dismiss on two general grounds.

First, that the acts of the defendants did not violate the rights of the plaintiff under the Commerce Clause of the Constitution of the United States or the Fourteenth Amendment thereto.

Second, that the action was one against the State of California, and not against the individual officers named as defendants, without obtaining the consent of the State and contrary to the Eleventh Amendment to the Constitution.

Although the Court, in its decision, under the heading of factual situation, [Tr. Rec., p. 23], has recorded certain of the allegations of appellant's second cause of action, which deals with interference of appellant's policyholders, there is no disposition of such situation in the Opinion itself. There is no later discussion upholding or condemning the alleged action of the defendants' interfering with the appellant's policyholders legally obtained.

Assignments of Error.

Appellant's Assignments of Error follow its Statement of Points to be Relied Upon on Appeal.

A.

The Court erred in dismissing the action for the reason that the allegations in the complaint set forth a Federal question within the jurisdiction of the trial Court and within the appellate jurisdiction of this Court for the reason that the question involved arises under the provisions of the Constitution and laws of the United States and involves the rights of the plaintiff and appellant thereunder.

1. The allegations of the Complaint set forth a Federal question within the jurisdiction of the trial Court.

2. The Plaintiff is entitled to an Injunction against the defendants and each of them pending the determination of such Federal question.

3. The Complaint complains of acts which violate the fundamental rights of the Plaintiff under the Fourteenth Amendment to the Constitution.

4. The acts of the Defendants complained of in the said Complaint are calculated to and will destroy the business of the Appellant already on its books and legitimately acquired.

5. The action is not one against the State of California, but is an action seeking an Injunction against acts of the Defendants performed under color of a State law void in its application to the facts stated in the Complaint and the determination thereof involved a Federal question.

B.

The Court erred in dismissing the action for the reason that the acts complained of in the said complaint, together with the state laws which they seek to enforce are in conflict with the Commerce Clause of the Constitution of the United States as follows:

1. The Complaint alleges facts in regard to certain transactions of the Plaintiff which constitute (without dispute) interstate commerce.

2. The acts of the Defendants complained of in the Complaint are done under the supposed authority of State laws which are extra-territorial in effect and which assume to regulate Plaintiff's business in the State of its organization and incorporation, and in all states in which it does business.

3. The acts of the Defendants complained of place an undue burden on interstate commerce.

4. The acts of the Defendants and each of them prohibit Plaintiff from completing any interstate transaction with any citizen of the State of California.

5. The acts of the Defendants complained of in the Complaint require the Plaintiff to obtain a license to enter into an interstate transaction with a citizen of the State of California.

Summary of Argument.

In this argument we shall follow an outline as set out in the Statement of Points to be Relied Upon on Appeal in the Transcript herein, [Tr. Rec., p. 67-68], and in our Assignments of Error, which we summarize as follows:

A.

1. The allegations in the complaint set forth a Federal question within the jurisdiction of the trial Court and within the appellate jurisdiction of this Court for the reason that the question involved arises under the provisions of the Constitution and laws of the United States and involves the rights of the plaintiff and appellant thereunder.

2. Plaintiff is entitled to an Injunction against the defendants, and each of them, pending the determination of such Federal question.

3. The complaint complains of acts which violate the fundamental rights of the Plaintiff under the Fourteenth Amendment to the Constitution of the United States in that it is excluded from doing business in the State of California under any circumstances, and from completing any interstate transactions with its citizens.

Complaint further complains that the defendants have interfered with its members and policyholders, even those acquired by transactions through the mail, by reinsurance contracts with California corporations, and those, who having obtained life insurance contracts with Plaintiff, had thereafter removed to the State of California, [Tr. Rec., p. 6, 7, 8, 9, and 10].

4. It is also alleged by the appellant that since a large number of its policyholders are in the State of California, that the continued campaign of the defendant to eradicate policies largely acquired from the corporation will weaken

its entire structure and threatens to destroy the corporation itself.

5. This action is not one against the State of California, but is seeking an Injunction against the defendants and appellees for two reasons:

First, that they are seeking to enforce invalid laws of the State of California, and

Second, that whether such laws are invalid or not, that the acts of the appellees and defendants in administering such laws are in violation of the rights of this plaintiff and its members.

Since the question as to whether or not such an Injunction suit is one against the State or one against the individual officers does not depend so much upon reference to the nominal parties on record, but is determined by a consideration of the nature of the case as presented on the whole record (as set forth in the Opinion in the Court below, Tr. Rec., p. 58 at the top of the page), and since the question is to depend chiefly upon whether or not there has been a violation of plaintiff's rights to its irreparable damage (as set forth in the Opinion of the Court below, Tr. Rec., p. 62), then such question will also depend upon the decision as to the main point in issue which follows.

B.

The acts complained of in the said complaint, together with the State laws which they seek to enforce are in conflict with the Commerce Clause of the Constitution of the United States as follows:

1. The facts alleged by the complaint (apparently without dispute), constitute a series of interstate transactions, which amount to interstate commerce. The only basis

upon which the acts of the defendants complained of could be upheld as valid under the Constitution of the United States would be that the said acts were done in inforcing a valid state law which does not discriminate against plaintiff and where the acts themselves are not in violation either of the Commerce Clause or the Fourteenth Amendment to the Constitution of the United States.

2. Such regulation of interstate commerce could only be valid where its application is purely local in effect, and could not be upheld where either the state laws or the acts of the officers themselves are extra-territorial in effect, or anything more than purely local in application and whereas, in the instant case, these regulations reach out across state lines and attempt to regulate insurance business in other states they are in violation of the constitutional provisions.

3. The acts of the defendants complained of and the laws under which they were performed have always been held by the Supreme Court of the United States to be an undue burden on interstate commerce when applied to any other type of interstate commerce.

4. The acts of the defendants complained of, and the laws under which they were performed prohibited plaintiff from completing any insurance contract with a citizen of the State of California and are taking away from the plaintiff's Society those contracts which it already has with such citizens.

5. The acts of the defendants complained of and the laws under which they were performed require plaintiff to obtain a license or the permission of the State of California to enter into an interstate transaction with a citizen of that state. The decisions of the Supreme Court up-

holding the rights of the states in regard to importation and regulation of the distribution of certain products, even dangerous products, within its borders have never gone so far as to uphold a requirement that any one engaged in interstate commerce must obtain a license so to do, but have only upheld the regulation after the interstate transaction has ceased and the article is ready for distribution intrastate.

Argument.

A.

1. The determination as to whether or not a Federal question is involved depends largely (as does the question as to whether the suit is against the state or against the indivdual officers) upon whether or not the acts of the defendants and the laws of California complained of constitute a violation of appellant's rights under the Fourteenth Amendment to the Constitution and whether or not they constitute an undue burden upon, or interference with, or regulation of, interstate commerce in conflict with the provisions of the Commerce Clause of the United States Constitution. If these questions are determined in the affirmative, then there would be no doubt as to a Federal question being involved.

> Art. 1, Sec. 8, para. 3 (known as the Commerce Clause) of the United States Constitution.
>
> The Fourteenth Amendment to the Constitution of the United States.
>
> U. S. C. A., Title 28, para. 41 (1).

2. Plaintiff is entitled to an Injunction against the defendants, and each of them, pending the determination of the Federal question, even though it has not been de-

termined whether or not the acts complained of are in violation of plaintiff's right under the Constitution.

> "Although a state may not be sued without its consent nevertheless, a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States, *even though such injunction may cause the state law to remain inoperative until the constitutional* question is judically determined. The doctrine is elementary but we refer to a few of the leading cases by which it is sustained: *Penoyer v. McConnaughty,* 140 U. S. 1, 11 S. C. 699, 35 L. Ed. 363; *Regan v. Farmer's Loan & Trust,* 154 U. S. 362, 14 S. C. 1047, 38 L. Ed. 1014; *Ex parte Young,* 209 U. S. 123, 28 S. C. 441, 52 L. Ed. 714; *Princess v. Atlantic Coast Line Co.,* 211 U. S. 210, 29 S. C. 67, 53 L. Ed. 150; *Home Tel. & Tel. v. Los Angeles,* 227 U. S. 278, 33 S. C. 312, 57 L. Ed. 510; *Greene v. Louisville & Interurban R. Co.,* 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280."

3 and 4. We believe that there was some misunderstanding of our position by the court below in regard to the contention that the acts of the defendants and appellees were in violation of plaintiff's rights under the Fourteenth Amendment.

There are two causes of action set forth in the complaint.

The *first* deals with interference with the agents of the plaintiff and is concerned chiefly with an interference with plaintiff's interstate transactions amounting to interstate commerce.

The *second* complains of interference with the policyholders and members of plaintiff and appellant, legitimately on its books.

The said second cause of action complains of the invasion of the property rights of this plaintiff and appellant beginning at the middle of page 10 of the Transcript of the Record in the following language:

> "* * * many of which people took their policies in the State of Arizona and upon their removal to the State of California or change of residence the said (9) California insurance Commissioner, acting through his deputies, interfered with said people and advised them that their certificates were unlawful and illegal and of no value whatsoever and that they should drop them and insure in a company qualified in the State of California."

The complaint under this cause of action, beginning on page 6 of the Transcript of the Record, sets forth a series of acts of the defendants interfering with the policyholders of the plaintiff, telling them that their contracts are illegal, that they could not recover in case of loss, that they are not worth the paper they are written on, and advising them to drop these insurance policies and insure with a California insurer.

These allegations set up a plain case of invasion and destruction of the property rights and business of the plaintiff and appellant and there is no legal basis upon which such acts could be justified either under color of law or upon the initiative of the officers themselves and the allegation follows that the damage is in excess of $3,000.00, and that many thousands of members have dropped their insurance on account of such acts. Plaintiff was entitled to a trial of these statements in the lower court.

5. This action is not one against the State of California, but against the officers who are made defendants.

It is primarily a suit for an Injunction.

We believe that the statement of the Court below in its Opinion is correct insofar as it states, that if taking the entire complaint into consideration, the acts of the defendants complained of, and the law under which they were performed are unconstitutional, the action is not one against the state but against the individual officers, while on the other hand, if the officers are legally administering a constitutional statute and in no way violating the Constitution or laws of the United States, it would be a suit against the state.

Gunter v. Atlantic Coast Line R. Co., 200 U. S 273, 283;
Prout v. Starr, 188 U. S. 537;
Reagan v. Farmer's Loan and T. Co., 154 U. S 362;
Opinion of the Court Below, Tr. Rec., p. 61, 62.

If this then is the law (and the cases appear to be agreed that it is), this point is of no value in determining whether or not plaintiff and appellant is entitled to maintain this action, for the decision in that matter would follow the court's decision upon the constitutionality of the law involved and the illegality of the acts of the defendants thereunder.

In cases where the state officers have attempted to enforce an unconstitutional law or to administer a valid law wrongfully, their acts have been held to be so disassociated from the state for which they purport to act, so as to permit a suit to be brought against them with respect to those acts.

Ex parte Young, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L. R. A., N. S., 932, 14 Ann. Cas. 764;
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280.

The cases seem to be in agreement upon the proposition that so long as an officer is acting under the authority of a valid law, and not acting beyond his authority of that law, his acts constitute the acts of the state; but if he is acting under the color of an unconstitutional law or acting beyond the authority of any law, his acts are so disassociated from the state that an action may be maintained against him individually.

Since there appears to be no dispute in this situation, and since the determination of the constitutionality of the laws involved and the validity of the acts of the defendants under the Constitution of the United States determine this question, upholding or not upholding the right of action at the same time that it decides for or against the sufficiency of the complaint itself, this point becomes more or less academic, and upon the determination of the case on its merits would become a moot question.

B.

1. The transactions of the appellant set forth in the complaint constitute interstate commerce.

United States v. Southeastern Underwriters Assn., 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533;

Opinion of the Court Below, Tr. Rec., p. 24.

There could be no doubt that the transactions of the appellant, which it alleges were interfered with by the defendants, are interstate transactions. The completion of one such transaction required at least five transmissions across the state line, and since insurance is now commerce under the decision of *United States v. Southeastern Underwriters Assn., supra,* it must, when transacted across state lines, be interstate commerce. The fact that

these transactions do constitute interstate commerce has not been disputed in this matter.

2. This subdivision of our points to be relied upon deals with the main issue involved. If the regulatory laws of the State of California and the acts of its officers had reference only to the regulation of business to be conducted in California, we would not now be before this Court nor engaged in this litigation, but it has made as a preliminary to such qualification, the submission of appellant's business in every state in which it operates to the regulation of California. Unless a different and special rationale and reasoning in regard to interstate transactions is to be applied to insurance than has been applied to other types of interstate commerce, then the laws of the individual states and the acts of their officers must conform to principles well established by the Supreme Court.

Under a long line of decisions it has universally been held in all types of interstate commerce, other than insurance, that so long as an agent was engaged in interstate commerce he would not be required to obtain a license from the state in which he solicits business.

In 1869 a man by the name of Paul was arrested in Virginia for soliciting insurance without a license. In order to uphold this state requirement, the Supreme Court of the United States held that insurance was not commerce and hence could not be interstate commerce.

Paul v. Virginia, 8 Wall. 168.

This case was followed by a number of decisions upholding the rights of the states in this respect but never based upon any other proposition than the following of the case of *Paul v. Virginia, supra.*

Now, after seventy-five years, the Supreme Court, in applying the Sherman Anti-Trust Act to the Southeastern Underwriters Association, has reversed the old case of *Paul v. Virginia,* and held that "insurance is commerce and where conducted across state line is interstate commerce."

It is then, the effect which this decision may have upon the right of the states to regulate this field of interstate commerce which is involved in this case.

This matter is of outstanding interest to the insurance business of this country. The effect of the *Southeastern Underwriters Association* case has been commented on by Hugh Evander Willis, noted authority on Constitutional Law and author of the standard work, "Constitutional Law of the United States." In the Insurance Law Journal, successor to Insurance Decisions, published by the Commerce Clearing House, in an article beginning on page 390 of the July 1944 issue, at page 393, he makes the following observation:

> "Effect of Decision. The first and most lasting effect of this decision will be to give all insurance companies the benefit of the equality clause. This result will follow from making insurance interstate commerce, so as to give insurance companies the right to do business in every state without consenting to conditions of states for the privilege of entering the states. This will mean the stopping of all discriminations by the states under their tax power and police power against foreign insurance companies. This is a result that Congress cannot change because when the Supreme Court defines commerce its definition becomes a part of the Constitution and Congress cannot amend the Constitution."

The decisions in *United States v. Southeastern Underwriters Association,* 64 S. Ct. 1162, 88 L. Ed. 1082, 322 U. S. 533.

The opinion of the Court, delivered by Mr. Justice Black, is preceded by the statement that the old cases that followed *Paul v. Virginia, supra,* were testing the validity of state laws, while the case at bar was testing the validity of a Federal law as applied to the insurance business. In this case the argument was presented by the defendant that if the Court held that insurance was commerce then *all* state regulation would fall. We quote the language of the Court as follows:

> "Accepted without qualification, that broad statement is inconsistent with many decisions of this Court. It is settled that for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states."

The Court in its statement that such a contention if "accepted without qualification" would be contrary to many decisions of the Supreme Court and in stating that "it is a settled fact, for constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation," made quite clear that the Court's distinction between that phase of the business which could be regulated

by the states and that which is reserved for federal regulation is to be found in the cases already in existence.

The Court cites two definite lines of cases showing a definite line of distinction between these two phases and clearly indicating that in the Opinion of the Court, the division between state and federal regulation lies directly between these two lines of cases.

Representative of the cases cited by the Supreme Court which set out a phase of interstate commerce subject only to federal regulation the Court itself cites: *Crutcher v. Kentucky,* 141 U. S. 47. This case, after stating that it was the undoubted province of the state legislatures to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns, with regard to precaution to be taken in the approach of such trains to bridges, tunnels, dips, cuts, and sharp curves and so forth, the Court nevertheless held that the law of Kentucky was unconstitutional for the reason that it required that a license be obtained before entering into interstate business. The decision of the Court in this case is very well stated in the syllabus as follows:

> "Crutcher v. Kentucky, 141 U. S. 47. The act of the legislature of Kentucky of March 2, 1860, 'to regulate agencies of foreign express companies,' which provides that the agent of an express company not incorporated by the laws of that State shall not carry on business there without first obtaining a license from the State, and that, preliminary thereto, he shall satisfy the auditor of the State that the company he represents is possessed of an actual capital of at least $150,000., and that if he engages in such business without license he shall be subject to fine, is a regulation of interstate commerce so far as applied to a corporation of another state engaged in that

business, and is, to that extent, repugnant to the Constitution of the United States."

The next case cited by the Court was *Atlantic Refining Company v. Virginia,* 302 U. S. 22. In stating the facts involved in this case, the Court said:

> "First, Virginia recognized the Constitutional right of the company to carry on interstate business without paying an entrance fee. On the other hand, the company conceded that the Federal Constitution does not confer upon it the right to engage in intrastate commerce in Virginia unless it has secured the consent of the State."

The next case cited by the Court was *McGoldrick, Comptroller of the City of New York v. Berwind-White Coal Mining Company,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.

The gist of this case is that the Supreme Court upheld a sales tax by the city of New York on the purchasers of coal which had been shipped to New York from Pennsylvania. In upholding this tax, the Supreme Court laid emphasis upon the fact that the tax is upon the buyer, the seller being liable only if he fails to collect and pay over.

The above cases were cited by the Supreme Court in support of its statement that certain phases of the business were reserved for Federal regulation. How could the Court have put its position more clearly to the effect that the states could not require permission or license to enter into interstate business as applied to insurance and that state regulations in any manner discriminatory would be invalid.

In the other line of cases cited by the Court which are to the effect that other activities of a business which,

though subject to Federal regulation are so intimately related to local welfare that in the absence of Congressional regulation they may be regulated and taxed by the states, are as follows:

The Court here cites first the old case of *Gibbons v. Ogden,* 9 Wheat. 1 (200) (203) (210), 6 L. Ed. 23.

We shall not presume to give the Court any discourse on the law contained in *Gibbons v. Ogden* which has become practically the foundation of construction where the difference between State and Federal control of interstate commerce is involved. One of the many phases made clear by the Court in this case is that the state may not compel a party to obtain a license or permission to enter into interstate commerce.

Many of the older cases were cited by the Court. Another case cited by the Court as illustrative of the fact that some phases of a business may be subject to state control, while others are subject to Federal control is:

> *Kelly v. Washington,* 302 U. S. 1, 58 S. Ct. 87, 82 L. Ed. 3.

The pertinant part of this case again is well set out in the syllabus, (7) which reads as follows:

> "Inspection of the hull and machinery of motor driven tugs, in order to insure safety and seaworthiness, is not a subject as by its nature requires uniformity of regulation, and therefore this field is open to the States in the absence of conflicting federal regulation under the commerce clause. P. 14.
>
> "If, however, the state goes farther and attempts to impose particular standards as to structure, design, equipment and operation, which in the judgment of its authorities may be desirable but which pass beyond what is plainly essential to safety and seaworthiness,

> the State may encounter the principal that such requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule."

In fact all the cases cited by the Court in the *SEUA* case distinguished the sphere of regulation between the states and the federal government upon the basis of sustaining only that state regulation which is local in its application. Following the above quotation from this case, the Court continued:

> "In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accomplished."

In support of the above statement the Court has cited *Parker v. Brown,* 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315.

This case involves the California law regarding the marketing of raisins on a pro rate basis and was upheld upon the theory that while it, to some extent, affected interstate commerce it was chiefly local in character. The gist of this case is set out by the Court on page 363 of the United States Report as follows:

> "Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries."

The next case cited by the Court is *California v. Thompson,* 313 U. S. 109, 61 S. Ct. 930, 85 L. Ed. 1219.

This case involved the California law requiring those engaged in the business of "transportation agent" who solicits or negotiates for the sale of transportation on the public highways of the state to obtain a license insuring his fitness etc. Paragraph One of the Syllabus reads as follows:

> "The commerce clause did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power even though the regulation affects interstate commerce."

Beginning on page 114 of the United States Report the Court said:

> "The present case is not one of prohibiting interstate commerce or licensing it on conditions which restrict or obstruct it. Crutcher v. Kentucky, 141 U. S. 47; Dahnke-Walker Co. v. Bondurant, 257 U. S. 282. For here the regulation is applied to one who is not himself engaged in the transportation but who acts only as broker or intermediary in negotiating a transportation contract between the passengers and the carrier. The license required of those engaged in such business is not conditioned upon any control or restrictions of the movement of the traffic interstate but only on the good character and responsibility of those engaged locally as transportation brokers."

The next case cited by the Court to uphold the above statement is *South Carolina State Highway Department v. Barnwell Bros., Inc.,* 303 U. S. 177, 58 S. Ct. 510, 83 L. Ed. 734.

This case upholds a law of South Carolina regulating the use of state highways. It is based upon two propositions: First, that the regulations are merely local in their application and Second, that the regulations apply to the use of highways constructed by the State of South Carolina with its own funds and that to deprive the state of the right to regulate its use when Congress has not acted and when the application is purely local in character would be to allow persons doing an interstate business upon the state's highways actually to use state property without the state having any right to designate the terms of such use for the protection of the highways and the public. The footnote in the *SEUA* case which cites the *South Carolina-Barnwell* case above calls attention to the long list of cases cited in footnote 5 of the latter case.

In fact there is a multitude of cases which uphold the right of the local state to make reasonable regulation of interstate commerce where those regulations are purely local in character and do not restrict, impede, or prohibit such commerce. Again we say "there are no cases which require a person to obtain the consent of the state to do an interstate business."

A reading of the text of *United States v. Southeastern Underwriters Assn., supra,* and the cases cited by the Court in support of its statements can leave but one conclusion as to what the Court had in mind in this regard and that is: *One,* there are some phases of a business which the state may regulate because they are purely intrastate. *Two,* that there are other phases of the same business which are interstate subject to federal control. *Three,* that there are other phases of the same business which although they may constitute interstate commerce their regulation would be purely local in character and would

not restrict or impede interstate commerce which in the absence of federal regulation the states may regulate and that illustrative of the statement that certain phases can only be regulated by the Congress are the cases which hold illegal state statutes which require a license or its permission to do an interstate business and that illustrative of those phases of the business which the states may regulate in the absence of Congressional legislation the Court has cited those cases in which the state laws are purely local in their application or pertain to the use of state property.

Western Union Telegraph Co. v. Kans., 216 U. S. 1, 27;
Fidelity & Deposit Co. of Maryland v. Tafoya, 270 U. S. 246.

3. The acts of the defendants complained of, places an undue burden on interstate commerce, for only those subjects of commerce which are local or limited in their sphere of operation may be regulated by the state until Congress has assumed control, but as to those that are national in their character the power of Congress is exclusive and until Congress acts such commerce is entitled to be free from state exactions and burdens.

Gibbons v. Ogden, 9 Wheat. 1 (222);
Passenger Cases, 7 How. 283, 462;
State Freight Tax Cases, 15 Wall. 232, 279;
Railroad Co. v. Husen, 95 U. S. 465, 469;
Welton v. Missouri, 91 U. S. 275, 282;
Mobile v. Kimball, 102 U. S. 691, 697;
Brown v. Houston, 114 U. S. 622, 631;
Walling v. Michigan, 116 U. S. 446;
Pickard v. Pullman Southern Car Co., 117 U. S. 34;

Wabash and Co. Railway Co. v. Illinois, 118 U. S. 557;

Wagner v. City of Covington, 251 U. S. 95;

Cushman Motor Delivery v. Smith, 1 N. E. (2d) 628;

Buck v. Kuykendall, Director of Public Works, State of Washington, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286;

Ben Wolf Truck Lines v. Bailey, 1 N. E. (2d) 660;

Detweiler et al v. Welch, Commissioner of Agriculture, State of Idaho, 46 Fed. (2d) 75, 73 A. L. R. 1440.

State regulation of interstate sales of commodities has been upheld only in the case of intoxicating liquors and that only on the authority of the Twenty-first Amendment.

State Board v. Young Market Co., 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38;

Indianapolis Brewing Co. v. Liquor Commission, 305 U. S. 391, 59 S. Ct. 254, 83 L. Ed. 243.

4. The acts of the defendants and each of them prohibit plaintiff from completing any interstate transaction with any citizen of the State of California. A local statute which discriminates, either by way of regulation or taxation, between local companies and those engaged in interstate commerce is void.

Brimmer v. Rebman, 138 U. S. 78, 81;

Fidelity and Deposit Co. of Maryland v. Tafoya, 270 U. S. 246;

Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 65;

Darnell v. Memphis, 208 U. S. 113, 28 S. Ct. 247, 52 L. Ed. 413;

Walling v. Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. Ed. 691;

Rearick v. Pennsylvania, 203 U. S. 507;

Robbins v. Shelby County Taxing District, 120 U. S. 489;

Caldwell v. N. Carolina, 187 U. S. 622;

South Carolina State Highway Department v. Barnwell Bros., 58 S. Ct. 510, 303 U. S. 177, 83 L. Ed. 734;

Magnuson v. Kelly, D. C. Ky., 35 F. (2d) 867;

Werner Transportation Co. v. Hughes, D. C. Ill, 19 F. Supp. 425;

O'Connell v. Kontojohn, 179 S. 802;

Elmer v. Wallace, D. C. Ala., 275 F. 86;

Asher v. Ingels, D. C. Cal., 13 F. Supp. 654;

J. B. Colt Co. v. Melcham, 287 S. W. 1008, 172 Ark. 55;

Park McLain Inc. v. Hoey, D. C. N. C., 19 F. Supp. 990.

A state or its officers may not interfere with interstate sales, although the law is designed to prevent fraud in the selling of securities which affects securities coming from other states by requiring that persons dealing in them within the state, shall first be licensed, is not invalid as a direct burden on interstate commerce, such a law is only valid where it affects only intrastate sales and does not interfere with interstate sales or shipment of the securities.

Hall v. Geiger Jones Company, 242 U. S. 539;

Hatch v. Reardon, 204 U. S. 152;

Ware and Leland v. Mobile Company, 209 U. S. 405;

Angle v. O'Mally, 219 U. S. 128.

5. Where a sale is made by an agent or an order is solicited by him and delivery of the goods in consumation of the sale or in the filling of the order requires their transportation from one state to another the transaction is one of interstate commerce, and the state cannot require a license for such purpose.

Sonneborn Bros. v. Cureton, Tex., 43 S. Ct. 643, 262 U. S. 506, 67 L. Ed. 1095;

Hump Hairpin Mfg. Co. v. Emmerson, Ills., 42 S. Ct. 305, 258 U. S. 290, 66 L. Ed. 622;

Western Oil Refining Co. v. Lipscomb, Tenn., 37 S. Ct. 623, 244 U. S. 346, 61 L. Ed. 1181;

Chicago Portrait Co. v. City of Bellingham, Wash., D. C., 270 F. 584;

City of Roanoke v. Stewart Grocery Co., 176 S. 820;

Sillin v. Kesseg Ellis Drug Co., 26 S. W. (2d) 122, 181 Ark. 3867;

L. D. Powell Co. v. Rountree, 247 S. W. 389, 157 Ark. 121, 30 A. L. R. 414;

Charlton Silk Co. v. Jones, 212 P. 203, 190 Cal. 341;

W. W. Kimball Co. v. Read, 185 P. 192, 43 Cal. App. 342;

Wilmington Dry Goods Co. v. Nat'l. Automatic Mach. Co. Super, 190 A. 735;

Mergenthaler Linotype Co. v. Gore, 160 S. 481, 118 Fla. 889;

Wilk v. City of Barstow, 97 S. 307, 86 Fla. 186;

Crump v. McCord, 113 S. E. 534, 154 Ga. 147;

Richard Young Co. v. Meyer Rudolph Shoe Co., 261 Ills. App. 327;

London Guaranty and Accident Co. v. Watte, 234 Ills. App. 497;

Higgin Mfg. Co. v. Foreman Bros. Banking Co., 222 Ills. App. 29;

City of Rushville v. Heyneman, 114 N. E. 691, 186 Ind. 1;

Melton Electric Co. v. Central Credit Corp. 28 S. W. (2d) 507, 234 Ky. 469;

Security Finance Co. v. Collins, 5 S. W. (2d) 886, 224 Ky. 134;

Brenard Mfg. Co. v. Jones, 269 S. W. 722, 207 Ky. 566;

Larkin Co. v. Commonwealth, 189 S. W. 3, 172 Ky. 106;

State v. Premier Malt Sales Co., 136 S. 5, 172 La. 923;

Ballard v. Wrought Iron Range Co., 81 S. 429, 144 La. 931;

Real Silk Hosiery Co. v. City of Portland, 268 U. S. 325;

Brennan v. Titusville, 153 U. S. 289;

Texas Transport Co. v. New Orleans, 264 U. S. 150;

Alpha Portland Cement Co. v. Commonwealth of Mass., 268 U. S. 203;

Schaffers v. Farmers Grain Co., 268 U. S. 189;

Lemke v. Farmers Grain Co., 258 U. S. 50;

Buck Stone Co. v. Vicara, 226 U. S. 205;

Stewart v. Michigan, 232 U. S. 665;

Crenshaw v. Arkansas, 227 U. S. 389.

The Opinion of the Court below sets out in substance appellant's position, [Tr. Rec., p. 27-30], and we submit to this Court that this is not an attempt by a foreign insurance company to transact business in the State of California without meeting the standards of safety set by that

state, but is rather a determniation as to whether or not the State of California or any state can reach out across its state lines and regulate the corporate structure, the actuarial standard, and even the bookkeeping basis as well as complete regulation of such foreign company's business in every state in the Union, for the privilege of transacting an interstate business with the citizens of California or the state attempting to so regulate, even though such business may be small in comparison to the company's business elsewhere.

This case does not present the question as to whether or not the laws of California will be nullified but as to whether the State of California can nullify the laws of every other state in the Union if the companies organized in those states are to do an interstate business with the citizens of that state.

It should be borne in mind that there is no showing that appellant and plaintiff does not meet all the requirements of the State of California for doing business therein.

The sections under which the agent, F. O. Robertson, was arrested are 703(a) and 1642 of the California Insurance Code, which provide as follows, respectively:

> "703. Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:
>
> (a) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State."

and

> "1642. A person shall not act as an insurance agent, broker, or solicitor until a license is obtained from the Commissioner, authorizing such person so to act."

It has been contended by the defendants that there is no descrimination against plaintiff in their conduct and in the enforcement of the California statutes. Section Number 10818 of the California Insurance Code reads as follows:

> "10818. On and after January 1, 1940, no new insurer may be organized or admitted to operate under this chapter. Nothing herein contained shall prohibit an insurer theretofore existing under or by virtue of this chapter from transforming to an insurer operating under the provisions of Chapter 9a of this part nor shall anything herein contained prohibit an association now operating under Chapter 8 of this part from transforming to an insurer operating under this chapter at times and in the manner provided in Chapter 8. Any corporation formed pursuant to section 10815, which, prior to January 1, 1940, exhibits proof satisfactory to the commissioner that it has procured one hundred subscribers or applicants who have each paid the required initial premium, and which also deposits with the commissioner on or before January 1, 1940, the sum of $1,000 as a payment on its statutory deposit, may be admitted on completion of its organization and statutory deposit on or before July 1, 1940."

The provisions of this chapter from Section 10810 to Section 10928 in the California Insurance Code are the provisions regulating companies similar to the appellant and prohibiting appellant from doing business in the State of California. It is true that it also prohibits new insurers in that state thereby creating a monopoly for the companies still doing such business within that state. As set out by the Court below, the defendants have contended that Appellant could qualify to do business in the State of

California, and cites Section 10510 of the California Insurance Code requiring a $200,000.00 deposit, which section appears in the same chapter providing for extended insurance and cash surrender values, none of which provisions could appellant legally comply with in the state of its organization, nor could any similar company comply with them in the State of California. No state in the Union requires a $200,000.00 deposit for a mutual benefit society and the maximum deposit for such a company in California is $25,000.00. Defendant's contention then that appellant could comply with the law of California amounts to saying that if it will violate the law of Arizona and of California governing mutual benefit societies, or if its officers will organize a new company with its insurance structure on an entirely different basis, and reinsure appellant therein and then cease to exist, its successor, a new corporation, could do business in the State of California.

In closing this argument, we wish to call the Court's attention to *State Farm Mutual Auto Insurance Company v. Duel,* 88 L. Ed. 481. This case involved a situation where the appellant had applied for a license to do business in the State of Wisconsin, and where the license was denied by the State of Wisconsin on the ground that its reserves in the State of Illinois were less than those required by Wisconsin.

Two contentions were made in the lower Court. (1) That this requirement was in violation of the Due Process Clause of the Constitution, and (2) that it was in violation of the Full Faith and Credit Provision of the Constitution. The *Southeastern Underwriters Association* case, *supra,* having been decided after the decision in the Court below, appellant raised the question of interference with interstate commerce in the United States Supreme Court.

The Court held that the first two contentions were not well taken. The third contention was disposed of by stating that since the appellant had not raised the matter in the lower Court and still had the opportunity of raising it, it would require that it first be disposed of by the lower Court. The Supreme Court entered into considerable discussion of the appellant's right to come back into the Supreme Court and test the question of the interference with interstate commerce and specified the *SEUA* case, *supra,* as an intervening event changing the situation, which would not leave the matter *res adjudicata* by affirmation of the lower Court's judgment, thereby recognizing that a changed condition now exists in regard to state regulation of interstate insurance business. It should be noted also that the appellant in the above case had applied for a license to actually "do business" within the State of Wisconsin, while in the case before this Court, the matter involved is the interference with interstate transactions. In disposing of this matter on the two grounds that Wisconsin was not violating the Due Process of Law Clause and the Full Faith and Credit Clause of the Constitution, the following statement was made by the Court:

> "If a state undertook to regulate out of state activities through such a requirement different questions would be posed."

We submit therefore that where the acts of the defendants and the law under which they presume to act

> (1) Prohibits the plaintiff and appellant from making any interstate transaction with a citizen of California under any circumstance.
>
> (2) Attempts to regulate plaintiff's activities in the state of its incorporation and in every state in which it does business.

(3) Attacks and seeks to destroy plaintiff's contracts held with citizens and residents of California legally acquired.

(4) Enters into a campaign of molestation not only with plaintiff's and appellant's agents, but with its members:

That the said acts and the law under which they presume to be performed are in violation of the Commerce Clause of the United States Constitution and the Fourteenth Amendment thereto, and that the judgment of dismissal of the Court below should be dismissed and the case remanded to the trial Court for trial of the issues presented in appellant's Complaint on file herein.

Respectfully submitted,

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